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No. 92-1692

In The
Supreme Court of the United States
October Term, 1992

City of Ely, a Minnesota corporation, Conservationists With Common Sense, Inc. a Minnesota not-for profit corporation; F.B. Hubachek, Jr.; Wilderness Outfitters, Inc.,

Petitioner,

v.

Friends of the Boundary Waters Wilderness; Sierra Club; The Wilderness Society; Defenders of Wildlife; Wilderness Watch; Wilderness Inquiry; Minnesota Public Interest Research Group; Izaak Walton League of America, Inc., and F. Dale Robertson, Chief of the U.S. Forest Service; Edward Madigan, Secretary of Agriculture,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR JAMES L. OBERSTAR REPRESENTATIVE OF THE EIGHTH CONGRESSIONAL DISTRICT OF MINNESOTA AS AMICUS CURIAE SUPPORTING PETITIONERS

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May 13, 1993

QUESTIONS PRESENTED

1. May a Court interpret a statute which delegates authority to the Executive Branch in such a way as to deprive the Executive Branch of any discretion under the statute?

2. May a Court substitute its own definition of "feasible" irrespective of the text, context, and legislative history of the term in a particular statute?

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I. INTEREST OF AMICUS CURIAE

Congressman James L. Oberstar is the Representative of the Eighth Congressional District of Minnesota. The Boundary Waters Canoe Area Wilderness (BWCAW) is located in the Superior National Forest, along the Canadian border, entirely within his Congressional district. Representative Oberstar actively participated in Congressional consideration of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495 (1978).

II. STATEMENT OF THE CASE

The Amicus Curiae adopts the Petitioners' Statement of the Case.

III. SUMMARY OF ARGUMENT

I strongly urge the Supreme Court to hear the case, *City of Ely; Conservationists With Common Sense v. Friends of the Boundary Waters Wilderness and F. Dale Robertson, Chief of the U.S. Forest Service*, docket # 92-1692, concerning the motorized portages in the BWCAW. The Eighth Circuit Court of Appeals misinterpreted the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495 (1978); this decision needs to be reviewed.

IV. ARGUMENT

Section 4(g) of the Boundary Waters Canoe Area Wilderness Act Pub. L. No. 95-495 (1978) states:

> Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the portages from Sucker Lake to Basswood Lake, from

> Fall Lake to Basswood Lake, and from Lake Vermillion to Trout Lake, during the period ending January 1, 1984. Following said date, unless the Secretary determines that there is no *feasible* nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above. [emphasis added.]

The Act permits use of motorboats on the lakes mentioned in the above language and clearly intends for visitors to traverse boats across the portages by mechanized means. Congress did not prohibit, or intend to prohibit, motor boat use on lakes and make it impractical to transport the boats to the lakes that allow motorized use. The Act, therefore, first permits the operation of motorized transportation across the portages; then establishes a process by which the Secretary should determine whether there is an alternative for motorized means across the portages. It is erroneous for the Court of Appeals to interpret Congressional intent as allowing motor boat use on these lakes, but making it impractical to transport the boats to those lakes.

The law directed the Secretary to determine alternative "feasible" non-motorized means across the portages. The Court of Appeals' definition of feasible clearly is not the definition commonly understood by citizens or lawmakers when using that term. I was a Member of Congress throughout the period of consideration of this bill in committee and on the House floor. I can assure this Court that when the term feasibility was used, our understanding of the application of that term was a use that was practical, from the standpoint in which people normally conduct this activity.

The lower court created its own definition of the term feasibility, in effect, rewriting the law to substitute "possible" for feasible. These are two vastly different terms, whose applications

have vastly different results. I believe it is vitally important for the Supreme Court to hear this case and decide if the lower court's interpretation is appropriate, because over 1,200 Acts of Congress include the term feasible. The lower court's redefinition of commonly accepted usage will have far-reaching implications for hundreds of other Acts of Congress, and further, will influence the writing of future legislation where the term feasible might be included.

The lower court's definition departs from common practice, usage, and understanding of the term in plain, simple English. If the Supreme Court does not definitively resolve this issue, some 1,200 current laws will have to be re-evaluated. Surely, the Supreme Court cannot allow that result to occur.

The Eighth Circuit Court of Appeals principally considered one decision by the Supreme Court, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 402 U.S. 401 (1971), as the basis for its erroneous definition for the term "feasible." This case was totally irrelevant to the motorized portage case; one particular example may be feasible in one situation, but may not be feasible in another situation. Overton Park weighed the feasibility and "prudence" of "sound engineering" when routing a highway around a park rather than through it. Overton Park does not support the definition of the term feasible as possible.

Staff from the Superior National Forest and the University of Minnesota Department of Physical Medicine joined in an exhaustive on-site demonstration in which series of tests were conducted to discern feasible methods for distinct population groups to move boats across Prairie Portage, Four Mile Portage, and Trout Lake Portage. The Forest Service concluded on the basis of these demonstrations that the only feasible method to transport the boats was by motorized means.

The series of tests to determine the feasibility of non-motorized means to traverse these portages, which the Forest

Service undertook, were comprehensive and completely open. The Forest Service conducted these tests under a variety of weather conditions and with a diverse group of participants representing a wide range of age and physical abilities. The tests were performed in the open, before the public eye, and were videotaped. The results and the videotapes were also made available to interested parties on both sides of the issue.

If the Forest Service is to be faulted for its efforts, then there is no limit to the number of Forest Service policies which can be subject to dismissal in keeping with the Circuit Court's ill-considered decision, as will comparable actions under the 1,200 federal laws that use the term feasible.

The Circuit Court's decision was nothing less than a summary rejection of a fair, open, and objective demonstration by the Forest Service. The resolution of this matter should not be allowed to end at the Eighth Circuit, which reversed a decision by the District Court by using an unusual interpretation of the term feasible. The Forest Service did not act in an arbitrary or capricious manner when coming to its decision. Rather, the Forest Service solicited the participation of skilled professionals, medical experts, and a wide range of citizens who are characteristic of those who use the BWCAW for recreational purposes. These tests could not have been more fair, objective and open. The tests demonstrated beyond a reasonable doubt that there is no practical feasible alternative to motorized assistance at these portages.

I also urge the Supreme Court to consider the severe adverse effect the Circuit Court's decision to terminate mechanized use of these portages will have on the local economy in northeastern Minnesota, closing off a source of income for outfitters and resorters, whose livelihoods depend on this activity. Additionally, the closure will virtually eliminate BWCAW access to the handicapped, elderly and families with young children. It will preserve the BWCAW for only the young and the strong.

Such far-reaching consequences should not rest with the decision of the Circuit Court; they should be considered by the highest court in the land.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed or in the alternative, the Petition should be granted and this case set for plenary consideration by the United States Supreme Court.

City of Ely;
Conservationists With Common Sense;
Amicus Curiae.

Respectfully submitted,

By _____
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May 13, 1993